June 15, 2009

Mr. Corbin Davis
Clerk
Michigan Supreme Court

Re: ADM File No. 2009-04.

Dear Clerk Davis:

Below are additional comments with respective to Administrative File 2009-04, the alternative proposals regarding judicial disqualification; these comments are triggered by the United States Supreme Court's recent decision in *Caperton, et al., v. A.T. Massey Coal Co., Inc., et al.*.

"Question Authority" was a common bumper sticker in the 1970's.[1] The question of whether individual justices, the Chief Justice, the unchallenged justices, or some combination should determine recusal motions in the Michigan Supreme Court has been given added impetus by a June 15, 2009 Lawyers Weekly story titled "MSC recusal rule may not be constitutional." That article draws the conclusion from the comments of several individuals, including our former Chief Justice, Clifford Taylor, for whom I have the utmost respect, that "The U.S. Supreme Court has likely ended the Michigan Supreme Court's 172-year-old practice of allowing justices to decide for themselves whether to grant or deny motions seeking their recusal...." I think there are three issues here: 1)the (overlooked) question of authority; 2) the question of wisdom or sound policy, and 3)what does *Caperton* really say? I approach these in reverse order.

First, what does *Caperton* say? By way of context, it must be remembered that the Justices of the United States Supreme Court themselves individually decide motions to recuse brought with regard to an individual justice. After that justice decides the motion, the motion is *not* referred to the rest of the Court or to the Chief Justice for decision—the decision of the individual justice is *final* (and no hearing is held, and only rarely does a justice give reasons for his or her decision). There is not a word or syllable in *Caperton* suggesting that the process employed by the United States Supreme Court violates due process, or that the Court is going change its historic procedure. The very procedure employed in *Caperton* by the Supreme Court of Appeals of West Virginia was

[1] Wikipedia says: **"Question Authority** is a popular bumper sticker slogan which first appeared in the late 1970s, and a common graffiti slogan."

that the recusal decision was *made by the individual justice*, and there is not the slightest hint in the Court's opinion that this mechanism was in any way problematic. *Caperton* is *not* about the decision maker, but the *standards* to be employed by the decision maker. The essence of the Court's holding appears in its statement that "The *failure to consider objective standards* requiring recusal is not consistent with the imperatives of due process" (emphasis supplied).

Caperton is a case about standards and not about the identity of the decision maker. This is demonstrated not only by the fact that the United States Supreme Court employs the same recusal *mechanism*—decision by the individual Justice—as does the Supreme Court of Appeals of West Virginia, and the fact that the Court did not give any hint that there is any constitutional difficulty with this mechanism, employed in the case before it, but also by the Court's analysis. The Court was deciding that "actual bias" as a standard is not, standing alone, constitutionally permissible, not that individual justices cannot make the decision. The Court said that "the difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, *simply underscore the need for objective rules*" (emphasis supplied). It is a "*failure to consider objective standards* requiring recusal" (which, said the Court, must include a "probability of actual bias" component) which the Court concluded "is not consistent with the imperatives of due process." If review of the recusal decision is required by some other decision maker than the individual justice, then it is inescapable that the practice of the United States Supreme Court on recusal motions violates due process, and nothing in *Caperton* hints that that is the case, nor do I believe for a moment the Court so believes. Moreover, unlike the United States Supreme Court, where the decisions of individual justices on recusal are wholly unreviewable, review of decisions by individual justices in the Michigan Supreme Court on recusal motions *is* possible by way of petition for certiorari in the United States Supreme Court, and in criminal cases on federal habeas corpus as well.

What about sound policy? I addressed that point previously, joined by Justice Boyle, and will not repeat myself at any length here, but refer the reader to that comment, directing the reading also to several "tweaks" to Alternative A suggested in that comment that I think would make it even more clear that that standard would readily satisfy *Caperton*. I would add only that only that the statement of the majority opinion in *Caperton* that its ruling will not open any floodgates is not only, as the Chief Justice noted in dissent, "whistling past the graveyard," but, at least in Michigan, preposterous. What would make the matter far, far worse is to place the recusal decision in the hands of either the Chief Justice or the unchallenged justices. The attempts by parties to target and remove from the case justices they fear might vote against their position would proliferate exponentially. I believe this *must* be avoided. Adoption of Alternative A would establish rules that quite readily comport with due process while following the *mechanism* of decision employed by the United States Supreme Court itself.

Finally, but perhaps most importantly, the "authority" question. In Michigan, a recusal motion is addressed first to the challenged judge. If that judge denies it an equal-level judge (sort of the "first among equals"), the chief judge, considers it if the party desires. This system exists because a superior court, our Supreme Court, has so provided by promulgating rules on the matter. And the decision of the Chief Judge is reviewable on appeal by higher (superior) courts. But if there

is authority for an equal-level justice (for example, the Chief Justice) or group of equal-level justices (for example, the "unchallenged" justices) to review the decision of a justice not to recuse, and to oust that duly-elected (or appointed) justice from consideration of a case, I don't know where it comes from. I suspect this is precisely why in the United States Supreme Court each justice decides the question individually—the other justices have no authority to oust a justice from a case. Though I have considered this question last in order, I hope the court considers it *first* in importance, and ultimately concludes that the "tweaked" version of Alternative A—which includes decision on the matter by the challenged justice alone—presented in the previous letter from me and Justice Boyle is the one within the court's authority, and also the most sound.

I thank the court for its further consideration of my comments.

Very truly yours,

Timothy A. Baughman